

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35215

STATE OF IDAHO,)	2009 Unpublished Opinion No. 406
)	
Plaintiff-Respondent,)	Filed: March 31, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
JERRY RICHARD PALMER,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Timothy Hansen, District Judge.

Order denying Idaho Criminal Rule 35 motion, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Jerry Richard Palmer appeals from the district court's denial of his Idaho Criminal Rule 35 motion for correction of illegal sentence. We affirm.

Palmer pled guilty to lewd and lascivious conduct with a minor child under sixteen. Idaho Code § 18-1508. On May 5, 1999, the district court sentenced Palmer to a unified term of fifteen years, with an indeterminate term of three years. The judgment was entered May 10, 1999. On August 20, 1999 Palmer filed a Rule 35 motion for reduction of sentence, which was denied by the district court on September 14, 1999. On March 27, 2002, Palmer filed a Rule 33(d) motion asking for commutation of sentence to probation. The district court denied the Rule 33(d) motion on March 28, 2002. On March 18, 2008, Palmer filed the instant Rule 35 motion for correction of illegal sentence, which was denied by the district court on March 26, 2008. This appeal followed.

In his Rule 35 motion for correction of illegal sentence, Palmer claims that the “imposition of the sentence, not the length of the sentence” was illegal (emphasis in original). In his prayer for relief, Palmer asks that the court correct the sentence by reducing the imposed sentence to time already served. He also asks that the psychosexual evaluation be removed from the presentence investigation report, the records of the court, and the records of the Idaho Department of Corrections.¹ Palmer claims that the sentence was illegally imposed because his attorney failed to advise him that he had a constitutional right to refuse to participate in a psychosexual evaluation ordered for and used at sentencing.

The district court denied the motion on the grounds that it was untimely and that it constituted a prohibited successive motion. We agree. Rule 35 provides:

The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction. The court may also reduce a sentence upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking probation. Motions to correct or modify sentences under this rule must be filed within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction and shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion; provided, however that no defendant may file more than one motion seeking a reduction of sentence under this Rule.

Palmer claims that the psychosexual evaluation was prepared with his participation, due to his counsel’s failure to advise him that he could refuse to participate, and then used to his detriment at sentencing. Palmer argues that his sentence was, therefore, illegal. However, Palmer’s motion expressly challenges the imposition of the sentence, not the sentence itself. Thus, Palmer’s claim is not properly considered as a claim that his sentence itself was illegal, rather, at best, it is a claim that the manner in which the sentence was imposed was illegal. Even if we deem the motion to assert a claim that the manner in which the sentence was imposed was illegal, pursuant to the terms of Rule 35, Palmer was required to file the motion within 120 days

¹ Palmer does not pursue this relief or provide argument on appeal and, therefore we will not consider this requested relief. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

of entry of the judgment imposing sentence. Sentence was imposed in May 1999 and the motion was filed nearly nine years later on March 18, 2008. The motion is untimely and, therefore, the courts lack jurisdiction to consider the motion. *State v. Joyner*, 121 Idaho 376, 379, 825 P.2d 99, 102 (Ct. App. 1992). Moreover, the true basis of the claim is ineffective assistance of counsel, which is not properly remedied by a claim that the sentence, resulting from the ineffective assistance, is illegal or the manner in which it was imposed was illegal.

In addition, the relief requested by Palmer is reduction in his sentence. To this extent, therefore, the motion constitutes an impermissible successive Rule 35 application for reduction of sentence. Palmer previously filed a Rule 35 motion which was denied and a Rule 33(d) motion which was deemed a Rule 35 motion and also denied. The courts lack jurisdiction to consider a successive motion for reduction of sentence. *State v. Wersland*, 125 Idaho 499, 505, 873 P.2d 144, 149-150 (1994).

The district court's order denying Palmer's Rule 35 motion is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**